No. 15,891

IN THE

United States Court of Appeals

For the Ninth Circuit

BERNARD KIRSCH,

Appellant,

vs.

GEORGE BARNES, MILTON L. HUBER, G. EDWARD GOODWIN, MILTON L. HUBER and G. EDWARD GOODWIN, a co-partnership, doing business as Huber & Goodwin,

Appellees.

REPLY BRIEF OF PLAINTIFF AND APPELLANT BERNARD KIRSCH.

DAVID LIVINGSTON,
JAMES R. MANSFIELD,
2025 Russ Building,
San Francisco 4, California,
Attorneys for Appellant.

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The Merits of the Cause of Action for Disparagement.

1. There was no necessity for alleging that the contract did not confer rights on the defendants or that such rights did not relate to plaintiff's property. Any such allegations would have been conclusions of law and improper.

At the outset of the brief filed by Messrs. Hill and Hill in behalf of appellee, George Barnes (herein called the Hill brief) under the heading "Preliminary Statement" it is said (p. 4):

> There was no allegation in either complaint that the contract did not give defendants genuine contract

rights, nor is there any allegation to the effect that such rights did not relate to and thus affect appellant's property, i.e., his timber.

Such allegations would have been improper as constituting legal conclusions. The contention that the amended complaint is wanting in this respect is without merit.

2. The false certificate was the means of procuring recordation of the contract and consequent disparagement of plaintiff's title.

The Hill brief (p. 15) quotes from Judge Halbert's first opinion a comment concerning the function of a certificate of acknowledgment and the statement therein that "the false certificate of acknowledgment, by itself, could impart no disparaging imputation or innuendo against plaintiff's interest in the timber" (T. 27). Our opening brief demonstrates that the cause of action is based not merely on the false certificate but on the ground that this certificate was attached to the contract. By this means the contract became seemingly eligible for recordation as a conveyance by Kirsch. As the result of recordation the contract became a cloud on Kirsch's title.

This explanation of the case is ignored in the Hill brief. The brief does consider the decision in *Greeninger v. New Amsterdam Cas. Co.,* 152 Cal. App. 2d 645, 313 Pac. 2d 607, and states that there "the specific issue was whether the notary's alleged misconduct was the proximate cause of damage" (br. p. 16). This is not correct. The principal aspect of Greeninger is that a false certificate when used to the damage of a person can be the basis of a cause of action (see op. br. p. 14). The question of

proximate cause arose only after the primary issue was determined.

The *Greeninger* case is a complete answer to the theory of the learned District Judge as to the function of a certificate of acknowledgment. It also disposes of the contention that a cause of action cannot be based on the injurious use of the false certificate alone.

The Hill brief (p. 16) repeats Judge Halbert's discussion of the *Greeninger* case in which he sought to distinguish it on the ground that Greeninger's deed had been procured by fraud. The answer is—as stated in our opening brief (p. 20)—that the notary had not participated in the fraud. The fact that Greeninger was entitled to rescind the deed was no part of the cause of action against the notary. The latter's false certificate was the means by which the parties guilty of the fraud were enabled to deprive Greeninger of his property. Likewise, in the case at bar the false certificate was the means by which the defendants were enabled to stop the sale. The Hill brief ignores this proposition. It is evident there is no answer.

Likewise, the Hill brief ignores the discussion in our opening brief (pp. 16-20) concerning *Heidt v. Minor,* 113 Cal. 385, 45 Pac. 700, which the learned District Judge cited in support of his theory that a false certificate is not actionable if "the underlying instrument is valid" (T. 26). As demonstrated in the opening brief, the *Heidt* case does not support this theory. The Hill brief also ignores that aspect of *Gudger v. Manton,* 21 Cal. 2d 537, 134 Pac. 2d 217, which decides that a writ of execution—valid in itself—can be used as a means of clouding title by placing it on record.

The Hill brief (p. 17) attempts to distinguish *Gudger v. Manton* on the ground that the recordation of the writ of execution created a false claim or cloud, and on the other hand, the recordation in the case at bar "merely disclosed that Barnes had contract interests affecting the property". Here the Hill brief ignores the reason why the Supreme Court held that Gudger's title was disparaged. The reason was that the effect of "the assertion by defendants of a claim to an interest in the property" was to discourage a prospective purchaser who "would naturally assume the plaintiff's title was not merchantable" (quoted at pages 12-13 of our opening brief). In the case at bar Kirsch was entitled to preserve the merchantability of his title of record by withholding acknowledgment of execution before a notary. If the defendants desired to frustrate this and to cloud Kirsch's title, they were restricted to lawful means. The use of criminal means to accomplish this result was actionable.

The brief filed by Mr. Wilkins in behalf of appellees Huber and Goodwin (herein called the Wilkins brief) seeks (pp. 3-4) to deny the felonious character of the conduct of the defendants in procuring recordation of the contract with its false certificate (Penal Code, section 115, see op. br. p. 9). This effort is based on the fact that in the past Kirsch had relied on Huber and Goodwin as his attorneys to arrange for acknowledgement of documents of title. In other words, the Wilkins brief endeavors to defend Huber and Goodwin on the theory that they could take advantage of the confidential relationship for their own ulterior purposes. Obviously, no such defense is available. The premise of Kirsch's reliance on his attorneys was that they would obey the law—not violate it.

The Wilkins brief (pp. 12-13) refers to section 1207 of the Civil Code and contends that this case should be deemed to involve a "defect, omission or informality" which was cured one year after recordation. The answer is that the certificate was not merely defective. It was false.[1] Section 1207 is not intended to cure the consequences of a criminal act. Furthermore, the recordation occurred on September 11, 1953. At that time negotiations were pending for the sale of timber and the state was ready to close the transaction. The prevention of the sale occurred prior to the expiration of one year. Hence, sufficient time did not elapse for section 1207 to be effective.

The Hill brief (p. 15) also uses the same pretext in referring to the certificate as "defective". The same answer is applicable. The certificate was false.

3. The false certificate.

The fact that an unrecorded or unacknowledged instrument is valid between the parties has no relevancy to the issue at bar.

The Hill brief (p. 15) and the Wilkins brief (pp. 11-12) rely on the principle that an instrument which is neither acknowledged by the grantor nor recorded is nevertheless valid and binding on the parties. This proposition is not relevant. If the defendants had not recorded the contract, the sale to the state would have been promptly consummated. It was the combination of the false certificate and the recordation of the contract as a seeming encumbrance imposed by plaintiff on his title that stopped the sale and inflicted the injury.

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[1]The same contention appears at page 11 of the Wilkins brief, where the document is characterized as a "defectively acknowledged instrument."

The foregoing discussion serves to reply to defendants' efforts to meet the proposition that in procuring recordation of the contract by means of the false certificate the defendants were guilty of wrongful disparagement of plaintiff's title (presented in sections 6-9, pp. 8-25 of plaintiff's opening brief).

The amended complaint presents a second alternative ground. This is based on the fact that the contract was not eligible for recordation because it did not affect title or possession to real property. This point is presented in sections 10-12, pages 25-38 of plaintiff's opening brief. We proceed to reply to defendants' argument on this issue.

4. The Hill brief disavows the basis of Judge Halbert's decision, viz.: that the contract conferred on the defendants an interest in the title to the timber.

Judge Halbert's opinion discusses plaintiff's alternate contention that the contract did not affect title to or possession of real property and was not eligible for recordation. In Judge Halbert's opinion he held: "This contract was unquestionably one in which the right to cut, remove and market timber was transferred which is in the nature of a contract for the sale of goods" (T. 45).

The Hill brief disavows this theory. It says:

> It is not important to the principle involved here to determine whether Barnes actually purchased an ownership interest in the timber, and for that reason much of the discussion contained in appellant's opening brief (pp. 35-38) is immaterial (p. 7).

The point which the Hill brief says is immaterial is the essential ground on which the District Court decided that

the contract was of such a character as to permit recordation. The Hill brief now concedes that it is unable to defend this point. Instead, it proceeds to advance the contention (pp. 7-11) that the contract affected the possession of real property. The Wilkins brief (pp. 13-14) adopts the same position. Hence, it will suffice to answer this contention and to show that the contract does not affect possession of real property.

5. The contract does not affect possession of real property.

The Hill brief asserts that the contract permits "one party to enter on certain property in which the other party has an interest" (p. 8). The Hill brief fails to quote any portion of the contract itself. Our opening brief (Sec. 11, pp. 29-32) analyzes the contract and demonstrates that the only covenant that it contains in this respect is Kirsch's agreement "to permit the timber to be logged". Furthermore, a contract permitting one party to enter on another's property does not create a right to possession of the property. The Hill brief (p. 8) cites *Western Machinery Co. v. Graetz,* 42 Cal. App. 2d 296, 108 Pac. 2d 711. There the owners of mining property leased it to operators who proceeded to enter into a contract for the rental of mining machinery. The machinery was permanently attached to the property and therefore became a part of the realty. The owners of the real property gave a trust deed as security for a loan. The lender had no knowledge of any adverse claim to the machinery. The owner-lessor of the machinery sued to recover it. His rights were held subordinate to those of the holder of the deed of trust but paramount to those of the owner of the real property. The court held that the lease of the machinery could have

been recorded and if so, it would have constituted constructive notice to the otherwise innocent encumbrancer. All that is decided in the *Western Machinery Co.* case is that leased machinery which is affixed to the realty becomes real property and for this reason the lease of the machinery came within the scope of the recording statute. Obviously, the case is not pertinent here. The Hill brief does not contain a clear statement of the case nor of the point decided. At pages 8-9 the Hill brief endeavors to construe the decision as follows:

> Thus, a lease agreement providing that personal property shall retain its character as such regardless of whether it may subsequently become affixed to realty, "is an instrument affecting the title to or possession of real property" and is properly recordable.

The fact is that the provision that the machinery should continue to be personal property had nothing to do with the recordability of the lease. On the contrary, it was because as a matter of law the machinery became a part of the realty that the lease was recordable. As the result of that principle of law the lease involved title to real property. The effect of recordation would be to notify subsequent purchasers that the machinery did not belong to the owners of the real estate but to a third party and therefore, that the rights of the third party could not be eliminated by a conveyance made by such owners.

Next the Hill brief (p. 9) cites *Wayt v. Pattee,* 205 Cal. 46, 269 Pac. 660. The brief (p. 9) states that this involved a private contract "which did not create or grant any interest in or encumbrance on real property". This is not correct. The case involved restrictions as to title and pos-

session by non-Caucasians which were contained in deeds by which the owners of lots in a real estate tract had acquired their property. When the restrictions expired, the owners agreed among themselves that "we will not permit occupancy of our land or property by any person other than of the Caucasian race, and that this restriction shall be incorporated in all deeds of transfer of this property" (p. 48; p. 661). The question arose as to whether recordation of the agreement gave constructive notice of its contents to negroes who were about to acquire title to one of the lots. The court held that the agreement affected title to real property and was therefore, within the definition of "a conveyance of real property" as used in Section 1215 of the Civil Code.[2]

The court placed particular emphasis on the provision in the Code section concerning an instrument by which title to any real property may be affected (p. 53; p. 663).

The statement in the Hill brief (p. 9) that the instrument involved did not create any interest in real property is squarely contradicted by the decision of the court.

Next, the Hill brief (pp. 9-10) cites *Weaver v. McKay,* 108 Cal. 546, 41 Pac. 450. A brief analysis of that case will demonstrate that it is not in point. There property which was subject to mortgage was sold. The deed contained a clause that it was subject to mortgage and that the grantees assumed the obligation and the mortgage

[2]Sec. 1215. Conveyance defined. The term "conveyance", as used in sections twelve hundred and thirteen and twelve hundred and fourteen, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills.

securing it. The mortgage was foreclosed and judgment given against the grantees of the property for the deficiency. They claimed to have been induced by fraud to accept the deed containing the clause of assumption. One of the grounds urged on appeal was that a certified copy of the record of the deed had been erroneously admitted in evidence. The basis of this contention was that the portion containing the words of assumption "was no part of the conveyance, and did not need to be recorded, and, therefore, a certified copy of the record is not evidence" (p. 549; p. 451). Rejecting this contention the court held:

> The construction contended for is too narrow, but, even had the stipulation been contained in a separate instrument, it would be entitled to record under section 1158 of the Civil Code.
>
> (p. 549; p. 451.)

Obviously, the decision is not pertinent to the issue at bar.

Next, the Hill brief (p. 10) quotes dictum from *Warnock v. Harlow,* 96 Cal. 298, 31 Pac. 166, that an instrument "transferring the title to or creating a lien on property, or giving a right to a debt or duty" is recordable. This language originated in *Hoag v. Howard,* 55 Cal. 564, cited at page 10 of the Hill brief. The holding in that case was that a writ of attachment is not an instrument eligible for recordation. It is apparent that this proposition is not pertinent to the case at bar.

In our opening brief (p. 29) answering Judge Halbert's view that plaintiff transferred to Barnes an interest in the timber, we pointed out that the agreement provides nothing more than permission by plaintiff for the logging

operation and the designation of Barnes as general manager and that this did not constitute a transfer but merely a license (op. br. p. 34). The Hill brief (p. 10) contends that the cases above discussed "indicate" that a contract conferring such a license is eligible for recordation. The fact is that the cases contain no such intimation. To demonstrate this we need only refer to one of the cases cited at page 11 of the Hill brief—*Eastman v. Piper,* 68 Cal. App. 554, 229 Pac. 1002. According to the brief this case supports the view that "in a limited sense" a license is "regarded as an interest in land". In the *Eastman* case the court held that a license "is defined as a personal, revocable and unassignable permission or authority to do one or more acts on the land of another without possessing an interest therein" (p. 560; p. 1004). The court then distinguishes a license from an easement which "unlike a license, creates an interest in the land—an incorporeal interest" (p. 560; p. 1004).

Furthermore, the scope of the permission granted by plaintiff was expressly limited by the language of the contract, viz: "Kirsch agrees to permit the Prairie Creek timber aforesaid to be logged". The cases cited in our opening brief (pp. 25-29) demonstrate that this confers no title in the timber. By the same token it creates no right of possession. The holder of a theatre ticket has a right to attend a performance. But he has no right of possession to the building in which the performance is to take place. An agreement with a plumber for installation of bathroom fixtures in a home is a license to enter for that purpose. But his contract does not affect possession of real property.

Next, the Hill brief (p. 11) states:

> Moreover, it is appellee's contention that this contract was not revocable at will, and hence not a license. However, this question is the subject of an independent appeal currently pending in this Court.

This statement evinces a misapprehension as to the issue involved in the action in which the appeal is pending (*Kirsch v. Barnes,* et al., 15345). One of the points there presented is whether or not Kirsch was entitled to terminate the contract without subjecting himself to liability for damages. This issue is pertinent to the field of contracts—not the right of possession. A party to a contract always has the power to refuse to perform although he may be liable for damages for doing so. Barnes recovered judgment for damages and the question on appeal is whether he had a right of action for breach.

6. Plaintiff held record title to the timber and such title was by law protected against wrongful disparagement.

The Hill brief (p. 13) says that "if appellant recorded a document giving him only a personal property interest, he is in much the same position as Barnes". The Hill brief concludes that "If he (Kirsch) didn't record his document, he can't maintain this suit. If Kirsch did not have a record interest, recordation by Barnes could not have created an apparent encumbrance on his title, and could not have been the proximate cause, as alleged, of any damage to him".

The concept of placing the criminal in the same position as his victim is surely fallacious. However, plaintiff's right constituted a chattel real—"an interest akin

to a term for years'' (see Judge Halbert's opinion (T. 45) citing cases supporting this proposition). Such right to the timber was entitled to protection against disparagement.

7. The recordation of the contract was the proximate cause of the damages suffered by plaintiff.

The Wilkins brief (pp. 15-16)—under the heading: ''Proximate Cause''—advances a contention the essence of which is that the recordation did not cause plaintiff any loss because the defendants could have prevented the sale by notifying the state of the existence of the contract. This contention was anticipated and answered in our opening brief (p. 10). The contract contained no description of the property other than ''timber situated north of Orick, Humboldt County, California, and generally known as the Prairie Creek timber'' (T. 11). The contract provided nothing more than an arrangement for logging the timber, selling the logs and dividing the proceeds. Mere knowledge of the existence of such a contract would not have deterred the state from closing the sale. The title company's policy would have contained no exception involving the contract. The record title would have been clear. Furthermore, assuming that defendants could have stopped the sale by legitimate means, this does not confer immunity upon their unlawful conduct. The Wilkins brief ignores this argument.

We conclude that on two distinct grounds a cause of action for disparagement is set forth in the amended complaint. We proceed to reply to defendants' arguments with respect to the defense of statute of limitations.

Statute of Limitations.

8. Disparagement of title constitutes an injury to real property and the period of limitation is that applicable to such an injury.

The Hill brief (p. 20) cites *Italiani v. M-G-M Corp.*, 45 Cal. App. 2d 464, 114 Pac. 2d 370. The brief concedes that *Italiani* is not concerned with an injury to real property. It was an action for "damages arising out of alleged plagiarism on the part of defendant, of a moving picture scenario which was the composition of plaintiff" (p. 465). Italiani contended that the period of limitation was that provided in subdivision 3 of Section 338 of the Code of Civil Procedure.[3] The subdivision involves "goods or chattels". Obviously, the act of plagiarism does not constitute a taking or injury to goods or chattels. The subdivision also applies to specific "recovery of personal property". Obviously, damages for plagiarism cannot fall into that category. This aspect of the *Italiani* decision is clearly irrelevant to the question at bar.

The *Italiani* case proceeds to hold that the appropriate limitation with respect to a suit for plagiarism is found in subdivision 1 of Section 339 holding that the language thereof, viz.: "liability not founded upon an instrument in writing" includes "all actions at law, not specifically mentioned in some portions of the statute" (p. 467).

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[3]The language of the subdivision which the Hill brief neglects to quote—is as follows:

> 3. An action for taking, detaining or injuring any goods, or chattels, including actions for the specific recovery of personal property.

Based on the foregoing ruling the Hill brief (p. 21) reaches a conclusion which is completely unjustified by the premise. The brief says:

> Thus, the basic holding of the Italiani case is that actions for injuries to intangible or incorporeal rights, which rights may exist in connection with any piece of specific physical property, are governed by Code of Civil Procedure Section 339 (1).

There is no such decision in *Italiani.* The discussion in the opinion concerning "intangible or incorporeal rights" is a part of the reasoning by which the court concludes that the Code section concerning torts with respect to goods and chattels does not apply to "intangible or incorporeal rights." There is nothing in *Italiani* to support the contention in the Hill brief that disparagement of the title of physical real property is not an injury to real property. There is nothing in *Italiani* that throws any doubt on the proposition that such an injury to real property is covered by subdivision 2 of Section 338.

Even if there were any such decision in *Italiani,* it would be of no effect. The *Italiani* case was decided by the District Court of Appeal. No application was made for a hearing in the Supreme Court. On the other hand, *Coley v. Hecker,* 206 Cal. 22, 272 Pac. 1045 (see op. br. p. 40) was a decision by the Supreme Court of California squarely holding that slander of title constitutes "an injury to real property" and rejecting the contention of Hecker that this phrase "was intended to include only physical interference with, or physical injury to real property. . . . " (p. 27). The *Coley* case involved Section 392 concerning venue. The language "injuries

to real property" in that section is identical in meaning with the language concerning limitation of actions, viz., "injury to real property" (Sec. 338, sub. 2). These words cannot mean one thing in one context and something else in another.

Hence, even if it were true—as the Hill brief contends—that *Italiani* is inconsistent with the theory of *Coley v. Hecker,* the latter would necessarily prevail because it is a ruling of the State Court of last resort. Furthermore, the Hecker case has been cited and followed in the recent decision of the California Supreme Court in *Albertson v. Raboff,* 46 Cal. 2d 375, 378, 295 Pac. 2d 405, 408 (see op. br. p. 40).[4]

The Hill brief attempts to avoid the conclusive effect of *Coley v. Hecker* on the theory that "the court had only two alternatives, i.e., to consider the action as an injury to property or to consider it as a personal tort to the owner" (p. 20). The significance of this statement is far from clear. What difference can the number of alternatives make? The *Coley* case defines what an injury to real property is. It decides that disparagement of title constitutes such an injury.

The same type of problem is presented at bar. This Court has the alternative of deciding whether disparagement of title is an injury to real property under section 338, sub. 2, or a tort against the owner under some other section of the statute of limitations. In view of the

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[4]This case and *Smith v. Stuthman,* 79 Cal.App. 2d 708, 709; 181 Pac. 2d 123, are cited in the opening brief but neither brief of defendants mentions them.

decisions of the California Supreme Court, the choice is clear.

In further support of the contention that disparagement of title creates a "liability not founded upon an instrument in writing" (subdivision 1 of §339), the Hill brief (p. 20) states that "Section 339(1) has been defined as the California catch-all statute for miscellaneous torts. See Witkin, California Procedure Volume 1, pages 648, 649".

There is no such definition in Witkin. The language of that text states that the code section is "a catch-all for *unusual* tort actions *not otherwise provided for*". The difference between Witkin's language and that in the Hill brief is significant. Furthermore, Witkin proceeds to say that we must eliminate among others "all actions based on intentional or negligent wrongs which result in . . . injury to or loss of real property" and then points out that very few tort actions remain. The remnant does not include disparagement of title.

We come now to the contention that this action is barred by the one-year limitation applicable to slander and libel of the person.

As we have seen, *Coley v. Hecker* determines the category of injury into which disparagement of title falls. *Albertson v. Raboff,* 46 Cal. 2d 375, 379, 295 Pac. 2d 405, 408 (supra), tells us that disparagement of title falls into a different category than an action for personal defamation (App. op. br. p. 40). Consequently, the decisions in other states applying to disparagement of title the limitation applicable to libel and slander of the person (see Wilkins

br. pp. 8-9; Hill br. p. 19) can provide no assistance in the case at bar.[5]

Both the Hill brief (p. 19) and the Wilkins brief (p. 8) cite *Carroll v. Warner Bros. Pictures,* 20 Fed.Sup. 405. We shall consider this citation only because it is a federal decision. It involved the law of the State of New York where the action was commenced. The point had not theretofore arisen in that state. Therefore, the District Judge chose to follow an Ohio decision. But aside from the effect of California cases as to the nature of an action for disparagement of title (see above), the significant aspect of the *Carroll* case concerns the language of the sections of the New York Civil Practice Act as to limitation of actions. The provisions of the New York law were altogether different from those of California. Subdivision (1) of section 50 of the New York Act covers injuries to the person. But unlike California law, section 50 does not contain any reference to libel or slander. The latter subject is covered in a different section, viz. section 51. Therefore, there was no reason for interpreting the provision with respect to libel or slander as being confined to a

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[5]In the appendix (p. ii) to our opening brief we quoted from subdivision (3) of section 340 the full text with respect to actions involving torts against the person. At page 40 of the brief there is an incomplete quotation which the Wilkins brief (p. 8) characterizes as "deliberately misleading". The fact that the complete text appears in the appendix and that the extract at page 40 was intended merely to show that torts involving offenses against the person—as opposed to real property—were covered by the first part of subdivision (3) should demonstrate that there was no intent to mislead.

tort against the person. The text of the New York Act is set forth in the footnote.[6]

We conclude that disparagement of title to real property is not controlled by subdivision 3 of section 340.

It is interesting to note that in 1957 the legislature eliminated any doubt as to the limitation applicable to slander of title. It added as subdivision 7 of the three year statute (C.C.P. §338) "an action for slander of title to real property". Of course, this does not control a cause of action which theretofore accrued. But in effect it has codified the pre-existing law. However, in a discussion in the State Bar Journal of September-October, 1957, p. 529, prepared by the Department of Continuing Education of the Bar of the University of California Extension, at the request of the State Bar's Committee on Continuing Edu-

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[6]Gilbert-Bliss, Civil Practice of N.Y. Annotated—Book 2 recompiled.

Sec. 50. ACTIONS TO BE COMMENCED WITHIN TWO YEARS.

The following actions must be commenced within two years after the cause of action has accrued:

(1) An action to recover damages for assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution or malpractice;

(2) An action upon a statute for a forfeiture or penalty to the people of the state.

Sec. 51. ACTIONS TO BE COMMENCED WITHIN ONE YEAR:

The following actions must be commenced within one year after the cause of action has accrued:

(1) An action against a sheriff or coroner upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty; except for nonpayment of money collected upon an execution;

(2) An action against any other officer for the escape of a prisoner arrested or imprisoned by virtue of a civil mandate;

(3) An action to recover damages for libel or slander.

cation of the Bar, it is stated that an action for slander of title "formerly fell within C.C.P. §343, providing a four year statute of limitations for actions not otherwise provided for." In other words, it was considered that the catch-all section applicable to such an action was Section 343 of the Code of Civil Procedure. This theory is open to question in view of *Coley v. Hecker,* and subsequent decisions to the same effect. But it confirms plaintiff's contention that the applicable period of limitation is not one year nor two years.

For the reasons above stated the action which was commenced on November 30, 1956 was not barred.

9. Slander of title, based on the recordation of a false document, is a continuing tort.

This point providing an additional answer to the defense of limitations is discussed at page 41 of our opening brief. The proposition and the cases cited are ignored in both the Hill brief and the Wilkins brief. Therefore, no further discussion is necessary.

10. By reason of the confidential relations between the parties and defendants' concealment of their conduct the statute of limitations was tolled until Kirsch discovered the fact that a false certificate had been attached to the contract. Therefore, regardless of which section of the Code is applicable, the action is not barred.

The Hill brief (p. 22) states: "Appellant nowhere specifically alleges when he first became aware of the false acknowledgment" (Also at page 3).

Apparently, the writer of the Hill brief has failed to read paragraph VII of the amended complaint. The last subparagraph reads:

> Defendants concealed from plaintiff and plaintiff did not know or discover that said certificate had been falsely made and attached to said contract until the occurrence of the events in February, 1956, hereinafter set forth (T. 34-35).

A subsequent paragraph of the pleading contains the allegation as to the confession of the fraud at the trial of the prior action in February, 1956.

The Wilkins brief (p. 4) admits that the amended complaint contains the allegation quoted above. It proceeds to refer (p. 4) to another allegation that "if plaintiff had received the purchase price on July 27, 1954, he could and would have invested the same" (T. 40). Then the Wilkins brief contends (pp. 4-5):

> . . . it is the only possible inference that by July 27, 1954, at the least, appellant had *actual* knowledge that the contract had been recorded and knew that a certificate of acknowledgment had been attached thereto. (italics quoted).

The answer is that no such inference can be drawn. The allegation as to what plaintiff could have done with the funds if available is not pertinent to the matter of discovery. It relates only to the issue of damages. It is premised on the hypothesis that there was no false certificate and that the sale had been completed according to plan. The allegation does not contain the slightest intimation with respect to the subject of discovery.

Apparently, what the writer of the Wilkins brief has in mind is that when the state refused to close the sale, this circumstance and the reason for the refusal eventually

came to plaintiff' attention. On the assumption that at that time plaintiff became aware of the recordation of the contract, the Wilkins brief (pp. 4-5) says that from this we must infer that plaintiff acquired actual knowledge of the fact "that a certificate of acknowledgment had been attached thereto". The answer is first, that actual knowledge of the contents of the document on record could only be obtained by examining the record and plaintiff did not do this. Second, plaintiff was not presumed to know that a certificate of acknowledgment was required in order to record the contract, or a fortiori, that a certificate of his own acknowledgment was necessary. Therefore, plaintiff did not even have implied knowledge of the attachment of the certificate. Third, plaintiff was not obliged to cudgel his memory in order to recall the circumstances of his signature to the contract approximately two years before and to realize that a false certificate must have been attached.

Then the Wilkins brief (p. 5) says:

> Apparently it is his (plaintiff's) contention that concealed facts of some nature or another, were revealed at the trial of February 1956, and that by reason of this revelation he "discovered" that the certificate of acknowledgment had been "falsely" made. Up to February 1956, appellant regarded the certificate of acknowledgment as being in order. He did not object or complain that such acknowledgment was "false".

The answer is first, that the concealed facts were not "of some nature or another". They were specific, viz: the certificate of acknowledgment had been attached a week after the contract had been signed and that this had been

procured by Barnes in cooperation with employees of Huber & Goodwin (Am. Comp. Par. VIII, T. p. 36).

Second, the statement in the Wilkins brief quoted above that prior to this revelation "appellant regarded the certificate of acknowledgment as being in order" is without foundation. Until so apprised by Barnes' testimony at the previous trial plaintiff had no knowledge that any certificate of plaintiff's acknowledgment was in existence.

The Wilkins brief (p. 5) then propounds this rhetorical question:

> What "concealed facts" were revealed to appellant at the trial of February 1956?

The answer—as above stated—is the attachment of the false certificate on October 23, 1952 at the instance of Barnes. But the Wilkins brief ignores this. Instead, it refers to the difference between Kirsch's and Huber's recollection as to the place where Kirsch signed the contract. This is not the significant aspect of the discovery. It is merely one more reason why the delay in the sale did not excite any suspicion in Kirsch's mind. But once Barnes gave his testimony as to the attachment of the false certificate, it made no difference whether the recollection of Kirsch or Goodwin as to the place of signature was correct.

The Wilkins brief (p. 5) contends: "Appellant, of course, had constructive knowledge of the recording on September 11, 1953 (T. 37)". The answer is found in the allegation of the amended complaint, paragraph IX (at pp. 37-38) that Barnes surreptitiously and for the purpose of impeding the sale to the State procured the recordation

of the contract and concealed the recordation from plaintiff. The rule as to constructive notice of a recorded document applies to subsequent purchasers. Furthermore, there was a fiduciary relationship between the parties. The effect thereof is decided in *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, 305 Pac. 2d 20 (op. br. pp. 43-44), viz:

> In view of the allegations indicating that a fiduciary relationship existed, the fact that a document disclosing these events was a matter of public record filed with the Secretary of State cannot alone cause the statute to run.
>
> . . . . . .
>
> The documents filed in that year, while public records and constructive notice for certain purposes, are not sufficient to start the running of the statute in favor of the fiduciary as to those of its members who had no knowledge of them (p. 562; p. 34).

Both the Wilkins and Hill briefs ignore the *Bennett* case and the principle therein set forth.

11. The date on which Kirsch could have commenced suit if he had known of the false certificate is immaterial. The determinative date is when the fraud was discovered.

The Hill brief (p. 23) relies on the fact that Kirsch sustained damage on the date when the state would have closed the sale if the contract had not been recorded. This was July 27, 1954. Then the Hill brief concludes that Kirsch's cause of action accrued on that date and implies —but does not expressly say—that the statute of limitations began to run.

This argument ignores the principle that where a confidential relationship exists, concealment tolls the statute

and the wrongdoer is estopped from taking advantage of it. This proposition and the California decisions supporting it are discussed at pages 42-44 of our opening brief. The subject is not even mentioned in either the Hill or the Wilkins brief. Likewise, there is no mention of the decisions.

The Wilkins brief (p. 7) contends:

> The complaint must set forth *specifically,* (1) the facts of the time and manner of discovery, and (2) the circumstances which excuse the failure to have made an earlier discovery.

The answer is that the cases cited in our opening brief (pp. 42-44)—and ignored by appellees—hold that in a case of confidential relationship "a plaintiff need not disprove that an earlier discovery could have been made upon a diligent inquiry but need show only that he made an actual discovery of hitherto unknown information within the statutory period before filing the action" *(Bennett v. Hibernia Bank,* 47 Cal. 2d 540, 564, 305 Pac. 2d 20, 35). Furthermore, there are allegations in the amended complaint amply explaining why Kirsch's suspicion was not aroused until the falsity of the certificate was revealed at the trial.

The foregoing suffices to answer the contention in the Hill brief (p. 23) involving the date of July 24, 1954. But in passing it should be noted that the Hill brief is in further error. It states (p. 23) that plaintiff "sustained damage on that date, which damage consisted of loss of a sale". The fact is that the sale was not lost. It was delayed. The damage resulted from postponement of the

receipt of the price and the imposition of taxes in the interim[7] (T. 40). Hence, the damage only began on July 24, 1954. It continued until Kirsch yielded to the demands of defendants for the escrow of funds and was able to consummate this arrangement (T. 39).

For the additional reasons above stated the action was not barred.

Dated, San Francisco, California,
September 29, 1958.

DAVID LIVINGSTON,
JAMES R. MANSFIELD,
Attorneys for Appellant.

[7]The Wilkins brief (pp. 16-18) contains the same misconception of plaintiff's damages, contending that the sole measure of recovery is the diminution of value of the property as the result of the disparagement. The answer is found in the allegations of the amended complaint specifically stating the items of plaintiff's loss.